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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-251

Garland M. Fitzpatrick, et al.,
Donald Matthews, et al., *Plaintiffs Petitioners*

v.

Frederick Bitzer, Chairman, et al., *Respondents*

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals of June 2, 1975 is reported at 519 F.2d 559. The opinion of the District Court of September 16, 1974 is reported in 390 F. Supp. 278 (D. Conn. 1974). Both opinions were printed in the appendix of respondent Bitzer in his Petition for Writ of Certiorari in No. 75-283 (hereafter App. as distinguished from the Appendix, hereafter A).

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article 1, Section 8, Clause 3 to the Constitution provides that the Congress shall have the Power... "To regulate Commerce...among the several States..."

Title VII of the Civil Rights Act of 1964, (Pub. L. 88-352 §701, 78 Stat. 253) as amended by the Equal Employment Opportunity Act of 1972 *(in italics,* Pub. L. 92-261, §2, 86 Stat. 103), in 42 U.S.C. §2000e, *et seq.*, provides in part as follows:

> For the purposes of this subchapter–
>
> (a) The term "person" includes one or more

> individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5),* or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, *except that during the first year after March 24, 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*
>
> . . .
>
> (f) The term "employee" means an individual employed by an employer, *except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*
>
> . . .

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

42 U.S.C. §2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . .

42 U.S.C. §2000e-5

. . .

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable *to secure from the respondent a conciliation agreement*

acceptable to the Commission, the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may* be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for

such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit *the Commission, or* the Attorney General *in a case involving a government, governmental agency, or political subdivision,* to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections *(c) or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the *basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.*

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are

maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

. . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Question Presented

Does the Eleventh Amendment prohibit a federal court from awarding back pay monetary relief against a state, in favor of employees of that state who established that they were victims of discriminatory state laws which violated Title VII of the 1964 Civil Rights Act as amended in 1972?

Statement of the Case

This suit was brought as a class action on behalf of all present and retired male employees to enjoin as violative of the 14th Amendment and the Civil Rights Act of 1871 the sexually discriminatory provisions of the Connecticut State Employees Retirement Act. After a three-judge court was convened, the complaint was amended to allege that the Retirement Act violated Title VII of the Civil Rights Act of 1964 as amended in March 1972 to include states, and so the court remanded the case to the single district judge who convened it, to consider the applicability of federal statutory law. Jurisdiction of this suit existed under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, 2281 and 42 U.S.C. § 2000e-5(f)(3). On mainly stipulated facts, the District Court found that the Retirement Act essentially granted to women employees having 25 or more years of service the right to retire five years earlier than similarly situated men and further that there were rate benefit differentials in favor of female over male employees with less than 25 years of state service. It held that this constituted an unlawful employment practice by Connecticut

because it discriminated between men and women in regard to fringe benefits and consequently violated Title VII and regulations thereunder. The District Court granted plaintiffs prospective injunctive relief and ordered defendant state officials and their successors to administer the Act without unreasonable sex classifications unfavorable to men. (App. 2a, 24a)

Plaintiffs, however, also sought monetary damages in the form of recalculated benefits for retired males retroactive to various points in time, the earliest in 1965, as necessary to give them complete relief. They further sought an allowance for reasonable fees for their attorneys, and the District Court found fees totaling $6,275 were fair and reasonable. The District Court held that monetary and attorneys' fees awards against the state were precluded by the Eleventh Amendment and *Edelman v. Jordan, infra,* since any recovery would come from the public treasury. (App. 22a-23a)

Two retired male plaintiffs (the petitioners here) who had been receiving lower benefits than comparable females appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit. Respondent state officials did not cross-appeal the basic decision striking down the sexually discriminatory provisions of the retirement laws. The Court of Appeals affirmed the District Court's refusal to award back pay, but reversed on the question of attorneys' fees. (App. 26a, 31a) It held that the Eleventh Amendment and this Court's decision in *Edelman v. Jordan* precluded an award of back pay by a federal court against a state, even though it said that Congress had intended to make that remedy available against the states under the Equal Employment Opportunity Act of 1972. (App. 39a-41a) It also held, however, that an award of attorneys' fees to the successful plaintiffs was not barred by the Eleventh Amendment. Each side timely filed a petition

for a writ of certiorari to review the holding adverse to it. This Court granted both petitions on Dec. 15, 1975, and consolidated the cases.

Summary of Argument

As this Court indicated in *Edelman v. Jordan,* 415 U.S. 651, *reh. denied,* 416 U.S. 1000 (1974), the threshold inquiry in this case is whether Congress has clearly indicated its intention to subject the several States to the full range of remedies available under Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972. Both the language of the 1972 amendments and their legislative history manifest the requisite intent. The literal language of the amendments compels such conclusion. Moreover, the legislative history is replete with references to the extension to state and local government employees of the remedies available to private sector employees under Title VII.

The Equal Employment Opportunity Act of 1972 is predicated upon Congressional power both under the Commerce Clause and under Section 5 of the Fourteenth Amendment. Early in this Court's history, in *McCulloch v. Maryland,* 4 Wheat. 316, 421 (1819), Chief Justice Marshall established the parameters of the exercise of that power:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Recent decisions of this Court teach that legislation directed at discrimination is within the scope of Congressional power under both the Commerce Clause and the Fourteenth Amendment and is plainly adapted to a legitimate end. Congress found widespread evidence of both intentional and

systemic discrimination in employment by state and local governments. The Act was an appropriate means of eliminating that discrimination, and is consistent, not only with power under the Commerce Clause, but particularly with the equal protection principles embodied in the Fourteenth Amendment.

The Fourteenth Amendment must be read as abrogating, *pro tanto,* the concept of state sovereignty embodied in the Eleventh Amendment, not only because the Fourteenth Amendment is later in time, but also because, in the limited area prescribed by that amendment, the states have no authority the exercise of which can or should be protected from litigation. Both framers and opponents of the Fourteenth Amendment, as well as the Thirteenth and Fifteenth Amendments and the contemporaneous implementing legislation, clearly understood that the principles therein embodied were antithetical to state sovereignty. Recent history had demonstrated that some of the premises underlying state sovereignty, and the Eleventh Amendment, were inaccurate. The states, as sovereigns, could not always be relied upon to "do right". Congress was therefore empowered under, *inter alia,* Section 5 of the Fourteenth Amendment to enact appropriate remedial legislation. It was under such legislation that this case arose, and that expressly provides for the equitable remedy petitioners seek.

Even assuming, *arguendo,* that, in addition to the exercise of Congressional power in enacting the 1972 amendments, there must be a waiver by the State of Connecticut of its immunity under the Eleventh Amendment, there is ample indication of such "implied waiver" here. The State has enacted and administers its own Fair Employment Practices Law and participates in the deferral provisions of Title VII; yet when its own employment practices were drawn into serious question by this litigation, no corrective legislation was forthcoming. Furthermore, Connecticut has for years accepted substantial

federal funds which have expressly been conditioned upon nondiscrimination in projects and activities supported by those funds. Both Title VI of the Civil Rights Act of 1964 and the State and Local Fiscal Assistance [Revenue Sharing] Act of 1972 mandate such nondiscrimination. The nondiscrimination provisions with respect to the receipt and application of federal funds should therefore be read as conditioning such receipt upon a waiver of Eleventh Amendment immunity.

If there is any Eleventh Amendment immunity here, Congress will have enacted a Title VII right without a truly effective remedy for victims of state discrimination. They will not be "made whole" like private sector employees, nor will their state employer be deterred from continuing discriminatory practices until a federal court acts prospectively. Moreover, a federal court has the power under Title VII to shape a complex but interconnected equitable decree, which could, as to necessary monetary aspects, take account of any severe fiscal impact on the State. Thus the civil rights legislation petitioners seek to uphold accords with concepts of federalism—and the rule of law in our times.

Argument

I. IN AMENDING IN 1972 TITLE VII OF THE 1964 CIVIL RIGHTS ACT, CONGRESS CLEARLY EXPRESSED AND INTENDED TO AUTHORIZE SUITS FOR EMPLOYMENT DISCRIMINATION BY STATE EMPLOYEES AGAINST STATES, TOGETHER WITH ALL EQUITABLE REMEDIES, INCLUDING BACK PAY, AVAILABLE AGAINST A PRIVATE EMPLOYER.

In this case, "the threshold fact of Congressional authorization to sue a class of defendants which literally

includes States is wholly" present, not absent as in *Edelman v. Jordan,* 415 U.S. 651 at 672, *reh. denied,* 416 U.S. 1000 (1974). Thus the Second Circuit necessarily said that:

> "...it is evident that the 1972 amendments to Title VII ... did contemplate private actions against state governments or their agencies. Thus, ... Congress intended to authorize a private suit for backpay by state employees against the state. To suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet. See *Employees v. Department of Public Health and Welfare,* 411 U.S. at 289-90 (Marshall, J., concurring)". *Fitzpatrick v. Bitzer,* 519 F.2d 559, 567, 568 (1975) (App. 39a, 41a).

To amplify Congressional language and history (and with United States Code references to Section 701), 42 U.S.C. §2000e now defines "person" to include "governments, governmental agencies, political subdivisions". An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees", and now an "industry affecting commerce" includes "any governmental industry, business, or activity." 42 U.S.C. §2000e(b) & (h). An aggrieved employee may file with the EEOC a charge against any employer, and then 42 U.S.C. §2000e-5(f) (1) expressly deals with the case "involving a government, governmental agency, or political subdivision". They may be prosecuted in the first instance only by the Attorney General, but aggrieved employees may intervene. If the Attorney General does not commence the action or enter into a conciliation agreement within 180 days, he shall notify the aggrieved employees who may bring a civil action within ninety days thereafter.

The United States District Courts shall have jurisdiction over all Title VII actions, and, if an unlawful employment practice is found by the court, all authorized relief, including injunctions, reinstatement, back pay, and

attorneys' fees are available against all covered employers without limitation. 42 U.S.C. §2000e-5(f) (3), (g) & (k).

Thus, in 1972 Congress erased virtually every distinction between the state as employer and any private employer. Identical treatment occurs throughout Title VII, except for initial enforcement procedures against governments by the Attorney General. If he fails to act timely, the right of suit and redress afforded aggrieved employees is the same whatever the nature of the employer. Had Congress wished to continue the dichotomy initially present in §2000e-5(f) in suits involving states, it could easily have done so. Had it wished to provide different remedies, or restrict monetary relief, it could easily have said so.

That Congress explicitly said what it intended is manifest from the legislative history. As originally enacted in 1964, Title VII did not cover state and local governments. This was a deliberate exclusion. House Rep. No. 914 (88th Cong., 2d Sess.), 1964 U.S. Code Cong. & Admin. News 2402. Both House and Senate reports accompanying the 1972 Amendments indicate that state employees were to be put on a par with all other employees and have access to all remedies under the Act. The House Report states:

> "Few of [the many state and local government] employees are afforded the protection of an effective forum to assure equal employment. The bill amends section 701 of the Civil Rights Act of 1964 ... to include State and local governments, governmental agencies and political subdivisions within the definition of 'employer' under Title VII. *All State and local government employees would under the bill have access to the remedies available under the Act.*
>
> . . .
>
> The expansion of Title VII coverage to State and local government employment is firmly embodied in the

> principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination." House Rep. No. 92-238 (92d Cong., 1st Sess. 1971), 1972 U.S. Code Cong. & Admin. News 2152, 2154 (emphasis added).

Senate Report No. 92-415 concluded similarly:

> "The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private industry section of the economy.
>
> ...By amending the present section 701 to include state and local governmental units within the definition of an 'employer' under Title VII, all State and local governmental employees would, under the provisions of the bill, have access to the remedies under the Act.
>
> . . .
>
> The last sentence of the Fourteenth Amendment, enabling Congress to enforce the Amendment guarantees by appropriate legislation, is frequently overlooked and the plain meaning of the Constitution allowed to lapse. The inclusion of state and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the 'appropriate legislation' to insure that all citizens are treated equally in this country." Senate Rep. No. 92-415 (92d Cong., 1st Sess. 1971); *Legislative History of the Equal Employment Opportunity Act of 1972,* 418-420 (hereafter cited as *Legislative History*).

Underlying the 1972 Amendments was the desire of Congress to give State and local government employees the same remedies already enjoyed by employees in private industry. Senator Williams, the Senate manager of the 1972 bill, argued,

> "At this time in our country's history it should be beyond question that the employees of State and local governments are entitled to the same benefits and protections in equal employment as are employees in the private sector". *Legislative History,* 1113. See also Hearings Before A Subcommittee of the Senate Labor and Public Welfare Committee, 92d Cong., 1st Sess., 59-60, 250, 400, 413, 414 (1971).

The Senate debates on proposals to retain the exemption indicate that Congress contemplated giving state and local employees the same judicial remedy already enjoyed by private employees. Senator Javits described "the power to litigate" against state and local governments as "the very least we can give the individual ... To me it is one of the most unchallengeable parts of the bill." *Legislative History,* 1174. Senator Williams placed in the record a Civil Rights Commission Report urging repeal of the exemption so that minority employees would be entitled to the court-appointed counsel and suspension of normal court costs authorized in Title VII cases. *Id.* 1123. Even those who supported continuation of the exemption recognized that, if it were repealed, the forum in which aggrieved state or local government employees could have their claims adjudicated was federal court. *Id.* 1105, 1167-8, 1610.

Congressional intent is further manifested by its comments on three decisions of this Court, two before and one after the adoption of the 1972 amendments to Title VII. The main Supreme Court decision regarding Congressional authorization of suits against the states was *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 1864 (1964). Under the standard set by *Parden* no

special language or legislative history seemed required for a federal statute to authorize such suits; a state was to be treated as any other defendant in determining whether federal jurisdiction existed. Thus the Court in *Parden* found jurisdiction to enforce the Federal Employers' Liability Act against a state railroad because "We think that Congress, in making FELA applicable to 'every' common carrier in interstate commerce, meant what it said." 377 U.S. at 187. In adopting the 1972 amendments to Title VII, Congress expressly referred to and relied on *Parden.* Senate Rep. No. 92-415, p. 11, n.6; *Legislative History,* 1165. Congress also expressly relied upon this Court's decision in *Maryland v. Wirtz,* 392 U.S. 183 (1968). Of that decision the Senate Report said:

> "The Court rejected the argument that Federal regulation of the employment practices of State and local governments is an improper infringement upon the sovereignty of the States." Senate Rep. No. 92-415, p. 11; *Legislative History,* 1165.

Under these circumstances there can be no serious question that Congress intended what the language of these amendments expressly provided, that state and local government employees could sue their employers in federal court and obtain any or all of the remedies authorized in section 2000e-5(g).

Moreover, *Employees v. Department of Public Health and Welfare,* 411 U.S. 279 (1973), has been "overruled" by Congress. In *Employees* plaintiffs sued a state agency for back pay and other relief under the Fair Labor Standards Act, 29 U.S.C. §216(b). The statute in question, establishing a minimum wage and creating a federal cause of action, had been amended in 1966 to cover certain state agencies, but there had been no change in a section providing for suits by employees against their employer for unpaid wages and liquidated damages. The Court construed

the statute to apply the minimum wage to the states, but held that – despite the language of the 1966 amendment – Congress had not intended to permit federal lawsuits to enforce the FLSA against a state agency. The Court reasoned that, if Congress had intended to render a state subject to federal litigation, it would indicate by clear language "that the constitutional immunity was swept away." 411 U.S. at 285. Mr. Justice Brennan, dissenting, contended there was no reason to assume Congress would resort to any such special language merely because a state, as any other employer, was being included under the Act. 411 U.S. at 290.

In May 1974, Congress adopted yet another amendment to the Act reaffirming its decision to authorize actions by employees "against any employer (including a public agency) in any Federal or State court..." to enforce the minimum wage. Public Law 93-259, §6(d) (1); 88 Stat. 61. The House Report revealed that this had been the intent of Congress in 1966, and that this Court had misconstrued the law.

> "The committee also acted on an amendment to Section 16(b) of the Act to make clear the right of individuals employed by state and local governments and political subdivisions to bring private actions to enforce their rights and recover back wages under this Act. This amendment is necessitated by the decision of the U. S. Supreme Court in *Missouri, et al.* (April, 1973) which held that Congress in extending coverage under the 1966 amendments to school and hospital employees in state and local governments did not explicitly provide the individual a right of action in the Federal courts although the Secretary of Labor was authorized to bring such suits." House Rep. No. 93-913 (93d. Cong., 2d Sess.); 1974 U.S. Code Cong. & Admin. News, 2850.

Congress' action suggests that it thought the *Employees*

majority erred in stating that, if Congress wanted to render a state liable to suit, it would say so in a manner different than used to render any other defendant liable to suit.

Although Congress could be presumed to be aware of the Eleventh Amendment and sovereign immunity, it is doubtful that few members have any idea of these arcane principles or their scope. However, many if not most members of Congress are cognizant of "state sovereignty" – the contention that the federal government has no moral right, and perhaps no constitutional power, to interfere in the internal workings of state government. This "doctrine" had been invoked in opposition to every piece of federal civil rights legislation for a decade. Argument over that issue was to be expected at the suggestion that Title VII cover state and local employees, and it occurred.[1a] Proponents of extended coverage asserted expressly that that extension was within Congress' power under Section 5 of the Fourteenth Amendment.[1b] Both historically and conceptually sovereign immunity is only a procedural incident to the substantive notion of state sovereignty. A Congress willing to enact legislation overriding the well-aired and strongly defended idea of state sovereignty would not have hesitated to explicitly override comparatively obscure immunity principles if such ultimate specificity were necessary.

1a See, e.g. Hearings Before a Subcommittee of the House Education and Labor Committee, 92d Cong., 1st and 2d Sess., 373-4 (1971); Hearings Before a Subcommittee of the Senate Labor and Public Welfare Committee, 92d Cong., 1st Sess., 175; 117 Cong. Rec. 31971; *Legislative History*, 1104-76, 1610-45.

1b Hearings Before a Subcommittee of the Senate Labor and Public Welfare Committee, 92d Cong., 1st Sess., 411, 412-13, 414, 455-56 (1971); House Rep. No. 92-238 p. 19, Senate Rep. No. 92-415, p. 12. For a comprehensive history of the 1972 amendments, see Sape & Hart, *Title VII Reconsidered: The Equal Employment Act of 1972*, 40 Geo. Wash. L. Rev. 824, esp. 847-50 (1972).

Confronted with compelling evidence of pervasive and institutionalized discrimination in state employment, Congress has by every reasonable standard of language and intent authorized private Title VII suits against states and provided for full equitable relief, including monetary incidents. It thus intended to abrogate any "immunity" of states to recovery of back pay. Petitioners here followed the procedures of amended Title VII, established as private persons or as "private statutory attorneys general" intentional sex discrimination in Connecticut's employment laws, brought about an end to such *de jure* discrimination, and should be entitled to the full relief, including back pay, mandated by Congress. In short, Congress pronounced in this area full individual employment equality under law and provided full remedies in order to enforce this equality.

II. IN AUTHORIZING PRIVATE TITLE VII SUITS AND MONETARY RELIEF AGAINST STATES UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT, CONGRESS HAS SATISFIED TESTS ESTABLISHED BY THIS COURT AND AFFORDED ANTI-DISCRIMINATION REMEDIES AND "PRIVATE" SUITS RECOGNIZED AS NECESSARY BY THIS COURT.

The Civil Rights Act of 1964 is based on Congressional power under both the Constitution's Commerce Clause (Art. 1, Sec. 8, C1. 3) and the Enforcement Clause (Section 5) of the Fourteenth Amendment. Section 5 provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article". As has been shown already, Congress in adopting the 1972 amendments recognized that discrimination by state and local governments violated the Fourteenth Amendment, and that inclusion of such governments within Title VII coverage was pursuant to Section 5. House Rep. No. 92-238, p. 18; Senate Rep. No. 92-415, pp. 10, 11.

> "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.
>
> We therefore proceed to the consideration ... under the *McCulloch v. Maryland* standard, whether §4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end', and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution'." *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966).

The Court had already pointed out at 384 U.S. at 650 that *Ex parte Com. of Virginia,* 100 U.S. 339, 345-46 (1880), decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power had the same broad scope expressed in the Necessary and Proper Clause, (Art. 1, Sec. 8, cl. 18) and the classic formulation of the scope of such powers by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 421 (1819). Similar language of Section 2 of the Fifteenth Amendment has also been broadly construed. *South Carolina v. Katzenbach,* 383 U.S. 301, 323-7 (1966).[2] In these Fourteenth and Fifteenth Amendment "state action" cases, as well as in the Thirteenth Amendment private action case of *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 440 (1968), this

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[2] In a later voting rights case, *Oregon v. Mitchell,* 400 U.S. 112 (1970), the Court upheld under various remedial theories the power of Congress to prohibit state use of literacy tests and suspend state residency requirements for presidential elections, but split on the attempt to legislate, non-remedially, the 18-year old vote. Mr. Justice Rhenquist, dissenting in *Fry v. United States,* 421 U.S. 542, 559 (1974), has recently stated that the Fourteenth and Fifteenth Amendments confer on Congress authority "to impose significant restrictions on what would otherwise be thought state prerogatives."

Court's test for judicial review became whether there was a rational basis for the action of Congress. Bason, *To Enforce These Rights,* 1973 Wis. L. Rev. 1085, 1092, 1097. The modern civil rights enforcement cases indicate Congress' predominant role in defining the scope of the enforcement of the Equal Protection Clause.

Just as governmental employees need Title VII protection given to employees of private industry, so also is their need for monetary remedies as great and as justified.

> "The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions.... If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality... It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers... Furthermore, in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit the judicial power to award backpay. These limiting efforts were rejected...backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Company v. Moody,* 422 U.S. 405, 416, 417, 418, 420, 421 (1975).

Without monetary relief, states will be able to use much less than deliberate speed to end discriminatory practices, and could even postpone with virtual impunity the day of final reckoning in the form of a prospective injunctive decree. Without monetary relief, the thousands of state employees who have been or will be victims of employment discrimination will not be "made whole" and

will not be put on a par with their counterparts in private industry as Congress intended. Without the prospect of back pay, victims of state discrimination would be less likely to bring suit if the Attorney General did not; and without attorneys' fees also, "private" suits, not discrimination, would be eradicated.

Furthermore, the Attorney General has insufficient staff or resources to seek relief for all those state employees who are victims of discrimination. His efforts would be confined to the largest or most egregious cases, and even in those, he may only seek prospective enforcement and be unwilling or reluctant to seek back pay relief. If the Second Circuit's holding is affirmed, then Congress would be hard-pressed to prescribe effective enforcement except by greatly increasing the Attorney General's staff and funding.

Aside from whatever factual support the Solicitor General may furnish to bolster the common sense claims of the preceding paragraph, this Court has found that Congress considered the policy against discrimination to be of the highest priority and private enforcement of Title VII to be a paramount objective. *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 45, 47 (1974):

> "In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII....the private right of action remains an essential means of obtaining judicial enforcement of Title VII.... In such a case the private litigant not only redresses his own injury but also vindicates the important Congressional policy against discriminatory employment practices."

cf. Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 207, 211-12 (1972).

In the case of governmental employees, such "private" suit nas a significant extra ingredient. Plaintiffs are acting in

place of the Attorney General under 42 U.S.C. §2000e-5(f)(1); they thus possess the nature of *statutory* private attorneys general seeking to vindicate important national rights of thousands of Connecticut's employees. The "delicate federal-state relationship" is no more jeopardized by their action as plaintiffs, than it is by suit of the Attorney General. The Second Circuit is additionally incorrect (App. 45a, n. 18) in suggesting a difference because "plaintiffs seek the back benefits solely for themselves", for if the Attorney General had sought and obtained back benefits, they would still inure to the entitled state employees. And such "benefits" are not of an ordinary private compensatory damage character. Congress had reason to give the Attorney General discretion to bring suit or not, and reason to give employees financial incentive to attack discrimination in federal court when the Attorney General could not or would not sue. Such suits as this are in effect suits by the United States against a state, and not barred by the Eleventh Amendment. *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965); see Note, *A Practical View of the Eleventh Amendment*, 61 Geo. L. J. 1473, 1498 (1973).

The Second Circuit erred not only in potentially devastating the enforcement of Title VII against States but also in asserting Congress had at its disposal in enforcing Fourteenth Amendment rights methods other than "federal damage suits" and then suggesting non-private or state-oriented methods. As we have shown, this is contrary to the specific mandate of Congress in amending Title VII in 1972, and, as we will demonstrate, it is contrary to the history of the adoption of the Fourteenth Amendment and legislation such as 42 U.S.C. §§1981-1983 – all of which manifest an intent to make federal courts the first line of defense in civil rights matters, usually in suits by private litigants.

> "After the War between the States, 'nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with

> enormously increased powers'. *Zwickler v. Koota*, 389 U.S. 241, 246 (1967). Section 1983 was enacted at that time as §1 of the Civil Rights Act of 1871, 17 Stat. 13. 389 U.S., at 247. That Act, and the Judiciary Act of 1875, that granted the federal courts general federal question jurisdiction, completely altered Congress' pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws. 389 U.S., at 245-246." *Huffman v. Pursue Ltd.*, 420 U.S. 592, 616, 617 (1975), (Brennan, J. dissenting).

In addition, the Second Circuit's suggestions are contrary to the history and tradition of most civil rights litigation. Where would efforts to end racial discrimination in Southern schools be – not to mention this and other forms of discrimination in all geographical areas – without private litigants in federal courts? The suggestion overlooks the actual experience with states. Connecticut may, for instance, support the paramount national policy with a plethora of anti-discrimination legislation (A. 5 *et. seq.*), yet it curiously seeks to avoid monetary redress to its citizen-employees when it has erred. Connecticut's legislature failed in two successive annual sessions following the 1972 Amendments to Title VII and this lawsuit, to conform to the mandate of Congress by eliminating the discrimination manifested in the very language of its retirement laws. Connecticut thus necessitated a federal court injunction (A. 4) – and in the process gained time at the expense of retired employees which aggravated the very issue now presented to this Court. This response on the part of the employer-state is no different from that which this Court recently indicated in *Albemarle Paper Company v. Moody, supra*, might be expected from a private employer if an award of back pay were not obtainable.

Whatever states may say in statutes and do about discrimination in the future, even an enlightened state like Connecticut has shown that it must be brought into federal

court where its employees are involved; and it will there assert any defenses available to "maintain its treasury" whatever its commitment to ending discrimination might otherwise be. In other words, Connecticut has shown the recalcitrance in regard to civil rights when its own interests are at stake which continues to justify the lack of confidence in state action that the framers of the Fourteenth Amendment and the early Civil Rights Acts saw so well over 100 years ago.

In enacting and amending Title VII, Congress has satisfied the tests of *Katzenbach v. Morgan, supra.* The legislation enforces rights secured by the Equal Protection Clause of the Fourteenth Amendment and is plainly adapted to that end. Congress was dealing with the fundamental human right to be treated equally, and in Title VII it legislated a complex of remedies necessary to enforce that right —injunctions to stop employment discrimination; back pay to deter it and, together with reinstatement, make whole its victims; and attorneys' fees to encourage enforcement of Constitutional principles and Congressional policies by private individuals. That legislation "consists with the letter and spirit of the Constitution", the Eleventh Amendment notwithstanding (as discussed at length in the final Section, IV). Since the principles underlying this action arise out of fundamental Constitutional guarantees under the Fourteenth Amendment, this Court's recent decision in *Edelman v. Jordan,* 415 U.S. 651 (1974), is not apposite. *Id.* 415 U.S. 651, 694 n. 2 (Marshall, J. dissenting). Indeed, this Court has repeatedly suggested, though never decided, that the very adoption of the Fourteenth Amendment may have limited *pro tanto* the Eleventh Amendment. *Ex parte Young,* 209 U.S. 123, 150 (1908); *Curtis v. Loether,* 415 U.S. 189, 198 n. 15 (1974); *Edelman v. Jordan, supra,* 415 U.S. at 694 n. 2. Assuming such *pro tanto* limitation, an award of back pay in this case would certainly be consistent with the letter and spirit of the Constitution, and with most praiseworthy national policy. Further, even without respect to such limitation, the State of Connecticut has waived any

immunity under the Eleventh Amendment (a matter addressed in the next Section, III).

III. RECENT DECISIONS OF THIS COURT INDICATE THAT UNDER APPROPRIATE CIRCUMSTANCES A STATE MAY BE RENDERED LIABLE TO SUIT IN FEDERAL COURT; SUCH CIRCUMSTANCES OF CONGRESSIONAL INTENT TO ABROGATE IMMUNITY AND STATE WAIVER OF IMMUNITY ARE PRESENT IN THIS CASE.

A. The Commerce Clause and implied waiver cases support Title VII relief:

This Court has approved the use of the commerce power to eliminate discrimination, in upholding the public accommodations section, Title II, of the 1964 Civil Rights Act. *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964). Title VII was also founded on the Commerce Clause and the definition of employer as a person "engaged in an industry affecting commerce" has remained essentially unchanged. 42 U.S.C. §2000e(b). Congress has made a rational determination that the unrest which could be generated by employment discrimination posed a threat to the free flow of commerce and therefore should be prevented in order to protect commerce. *Equal Employment Opportunities Commission, Legislative History of Titles VII and IX of the Civil Rights Act of 1964,* 3075-94 (1967). State governments employ many persons and utilize goods which travel in interstate commerce, and, as with private industry, discriminatory governmental employment practices jeopardize commerce. Consequently Title VII as amended constitutes a valid exercise of the power of Congress to regulate interstate commerce. See Comments, *Suing the State under Title VII in the Face of the Eleventh Amendment,* 1973 Wis. L. Rev. 1099, 1102-4.

Assuming, *arguendo,* any need to show that the state has "in effect consented to the abrogation of [its] immunity", circumstances showing such "constructive consent" or implied waiver predominate in this case. *Edelman,* 415 U.S. at 672. When the constitutionality of state law or conduct is in issue, a state, absent its express consent, should perhaps only be suable in federal court through its officers, under the reasoning of *Ex parte Young,* 209 U.S. 123 (1908). In recent decades, however, as Congress made greater use of its powers and subjected states to increased regulation, a rationale had to be found to prevent states from frustrating such federal regulation by determining themselves their immunity limits. The new rationale was "implied waiver" – which suggests some state activity but largely makes Congress the arbiter of states' immunity in areas subject to its regulation. Commerce Clause cases and even this Court's most recent Eleventh Amendment decision in *Edelman* lend support to the contention that in the case at bar there are circumstances of implied waiver sufficient to overcome any residue of state immunity.

In *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959), plaintiff had sued under the Jones Act for wrongful death under a federal law, but her case had been dismissed below based upon lack of waiver under state law. This Court rejected the determination of state law but looked instead to the compact between the two states. The compact under Article I, Sec. 10 had been approved by Congress, included a sue and be sued clause, and stated that nothing in it should impair "any right, power, or jurisdiction of...any court...of the United States or in regard to any navigable waters or any commerce between the states". The states were held to have waived their immunity by submitting to conditions imposed by Congress under its powers over interstate commerce.

The next case broadened the scope of Congressional power to waive state immunity. *Parden v. Terminal Railway,*

supra, 377 U.S. 184 (1964), involved a provision of the Federal Employers' Liability Act authorizing employees of a state owned railroad to sue in federal court for personal injuries sustained in the course of employment. Alabama contended that, to the extent that the FELA authorized such a suit against a state agency, it violated the Eleventh Amendment and was therefore unconstitutional. The Supreme Court rejected this argument on two grounds. The Court held, first, that the power to subject the state to suit was inherent in Congress' power to regulate interstate commerce.

> "Congress enacted the FELA in its constitutional power to regulate interstate commerce. ... While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty;' ... the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. ... By empowering Congress to regulate commerce, then the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity. ... By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads..." 377 U.S. at 191-192.

Second, the Court reasoned that in adopting the FELA Congress had conditioned the operation of an interstate carrier on the waiver of any immunity from suit and that Alabama had waived its immunity when it undertook to operate a railroad. Furthermore, waiver or consent was made a question of federal law, since the Court realized the state's determination could render Congressional power meaningless. Even the Justices who disagreed with the majority's interpretation of the FELA agreed it was within

the power of Congress to subject a state to suit. 377 U.S. at 198.

While *Parden* is also distinguishable from the case at bar on basis of its facts, it is still good precedent on implied waiver. Moreover, Title VII was adopted in part pursuant to the powers of Congress under the Commerce Clause, so the basis for upholding the FELA in *Parden* should sustain the assaulted portions of Title VII.

In *Employees v. Department of Public Health, supra,* 411 U.S. 279 (1973), the Court concluded (erroneously according to Congress, *supra* p. 17) that Congress had not intended to remove the immunity of state agencies from federal suit under the Fair Labor Standards Act, but agreed that it had the power to do so if it wished. Speaking for the majority, Justice Douglas said:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act .... But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in federal court." 411 U.S. at 284-85.

Consequently, he did not reach the issue of the state's actions under the implied waiver rule. Justice Brennan dissented from the majority's construction of the FLSA, but agreed that Congress had the power to lift a state's immunity. 411 U.S. at 298-324.

This Court held in *Edelman* that the Eleventh Amendment was a jurisdictional bar to retroactive payment from the state treasury of welfare benefits found to have been wrongfully withheld, and that the State of Illinois did not "constructively consent" to the suit by participating in

certain welfare programs and agreeing to administer federal and state funds in compliance with federal spending laws. All Justices appeared to agree that Congress had the power to subject the states to suit, but the dissenters urged that the state had waived its immunity in the sense noted in *Parden,* 415 U.S. at 678-696. Speaking for the majority, Justice Rehnquist said:

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Petty, Parden,* and *Employees*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.
>
> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent." 415 U.S. at 672.

Thus plaintiffs there could not rely on those three cases – but petitioners here can and do.

Plaintiffs in *Edelman* sought to enforce pursuant to 42 U.S.C. § 1983, rights granted under federal welfare legislation. § 1983, however, did not explicitly authorize suit against the state but just against persons, such as the state officials, acting "under color of State law". That is the main reason why only prospective injunctive relief was held available, and not also an order compelling "equitable restitution".

> "But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." 415 U.S. at 675-7.

Here there is a different question than in *Edelman* because the threshold fact of clear authorization to sue the states is present. Congress did authorize such "private" suits, and was acting pursuant to its powers under both the Fourteenth Amendment and the Commerce Clause. The Second Circuit erred in extending *Edelman* to dispose of the question here, and in relying on some of the same inapposite cases cited in *Jordon v. Gilligan*, 500 F.2d 701, 709 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) and *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 43 n. 7 (3d Cir. 1974), *vacated and remanded* 421 U.S. 983 (1975). Like *Edelman*, those cases do not involve the enforcement of underlying claims arising from the violations of substantive rights protected by the 14th Amendment. For instance, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), it was held that Congress could not authorize the states to violate the Equal Protection Clause by a section of the Social Security Act which authorized a one year waiting period for welfare benefits; this Congressional action was almost the opposite of what Congress did in 1972 in amending Title VII.

Thus, as already indicated, inquiry as to the scope of Congressional power should end once the "threshold fact" has been found in the context of Section 5 of the Fourteenth Amendment, as bolstered by the Commerce Clause and previously cited cases under both. However, if further inquiry is pertinent because of the consequences to the state treasury, *Edelman* acknowledges that injunctive decrees have "ancillary effects on such treasuries", and allows latitude to find "constructive consent" by the State.

> "We must judge the award actually made in this case, and not one which might have been differently tailored in a different case. ... As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 67.

B. The State's activities show implied waiver:

While the degree of any "implied consent" in civil rights cases should be restricted, Connecticut has taken certain actions from which, singly or together, its consent can be deduced. First of all, it has embraced the strong national policy of combatting discrimination by an array of legislation, and also exemplified in Article I, Section 20 of its 1965 Constitution. (A. 9 *et. seq.*) The existence of such state legislation is relevant under *Heart of Atlanta Motel v. United States, supra,* 329 U.S. at 259-61. Connecticut has provided agencies, prohibitions, sanctions and relief similar to Title VII and to federal anti-discrimination laws in other areas. Significantly, it has not only adopted its own Fair Employment Practices Law, Conn. Gen. Stat. 31-122 *et. seq.*, but it also administers such laws *together with* the deferral provisions of Title VII, e.g. 42 U.S.C. §2000e-5(d). *cf. Parden* and *Petty, supra.* Having thus agreed with the endeavors of Congress to fight discrimination in all important respects, it should not thereafter be able to carve out an exception in order to avoid payment to its victimized employees who had to resort to federal court. And in no sense does deterrent back pay relief interfere with Connecticut's performance of its functions as a government or with "cooperative federalism."

Secondly, Connecticut was put on notice when Congress passed the 1972 amendment that it would be placed under the same restrictions as other employers, yet it took no corrective action. In the face of an expanded Title VII, the EEOC guidelines of April 1972 (App. 17a), and plaintiffs' EEOC complaint and lawsuit, Connecticut's General Assembly did not seize the opportunity in either its 1973 or 1974 sessions to correct the discrimination written into its retirement laws. The State necessitated the injunctive relief that was finally rendered by the District Court, yet it then did not even appeal that decision. This situation raises "the spectre of a state, perhaps calculatingly, defying federal law". *Edelman,* 415 U.S. at 692 (dissenting

opinion). This sort of inaction contrary to public interest should be deterred, not encouraged by a shield of "immunity". The money sought here is for remedial and deterrent purposes, unlike the damages of essentially compensatory character in *Edelman* and a case it approvingly cited, *Rothstein v. Wyman,* 467 F.2d 226 (2d Cir. 1972), *cert. denied,* 411 U.S. 921 (1973).

Moreover, the notice ingredient added to implied waiver principles by *Employees* has no place in a discrimination case. The situation is instead much like *Parden:* Connecticut knew its retirement system was discriminatory, and after the March 1972 amendments, it knew of its duties and liability to federal court suit. Yet it did not change its discriminatory retirement system, and it did participate in the Title VII deferral provisions. Unlike the State of Missouri in *Employees,* Connecticut had some choice, but more importantly, it had no business discriminating and should not rely on lack of notice. Also, the strict waiver standards of habeas corpus cases involving vital legal rights of individuals in criminal contexts, *cf. Fay v. Noia,* 372 U.S. 391, 439 (1963), should not be extended to the immunity of states. Note, *A Practical View of the Eleventh Amendment,* 61 Geo. L. J. 1473, 1495 (1973). A state has "knowledge" only through its agents, and it – or they – should expect that certain activities will become the concern of federal remedial legislation.

Thirdly, the State waived a portion of its immunity when on June 30, 1866 it ratified the Fourteenth Amendment (an aspect of the case discussed in the Section IV of this brief). It thereby consented to any reasonable Congressional legislation to implement that amendment and to provide remedies for discrimination otherwise inconsistent with the Eleventh Amendment.

C. Such waiver is further shown by state receipt of federal funds:

In adopting the 1972 amendments to Title VII Congress was especially concerned that state agencies which were the recipients of federal grants be prevented from engaging in racial discrimination. Senator Williams argued in support of applying Title VII to state and local governments:

> "The Federal Government's interest in State and local government operations cannot be underestimated. There are approximately 10 million employees of State and local political subdivisions. The Federal Government alone will distribute more than $43 billion of its tax revenues to those levels in the next year. ...
>
> Mr. President, it is clear that with the expenditure of such sums comes the responsibility of making sure that the distribution and use of the funds is without discrimination. The failure to have adequate minority representation in those agencies of Government responsible for expending those funds is an element of this discrimination." *Legislative History,* 114-15; see also 1138-51.

The Civil Rights Commission, which also supported such coverage, urged:

> The receipt of Federal grant-in-aid funds and the accompanying responsibility for implementing the Federal program supported by the Funds engender numerous job opportunities with the recipient State and local agencies. The obligations of the Federal Government with respect to discriminatory actions by these recipients are based on the Due Process Clause of the fifth amendment which prohibits governmental support or involvement in discriminatory activities. Its involvement in grant programs as financier, prescriber of standards, and supervisor of execution, imposes a duty on the Federal Government to ensure that there is no discrimination in the job opportunities provided by the funds. *Id.* 1123.

The particular concern of Congress to subject grant recipients to the provisions of Title VII is clear.

This strong concern of Congress that federal funds not be expended by the several states in programs or activities under which any person may be denied benefits or participation because of prohibited forms of discrimination also finds unambiguous expression in both Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and Section 122 of the State and Local Fiscal Assistance Act of 1972 (hereinafter referred to as the Revenue Sharing Act), 31 U.S.C. §1241. Section 122(a) of the Revenue Sharing Act provides:

> "No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [the Revenue Sharing Act]."

Section 601 of Title VI contains identical language, except that it inexplicably does not encompass sex discrimination and it applies to "any program or activity receiving Federal financial assistance".

Pursuant to his authority under Section 142(a) of the Revenue Sharing Act, 31 U.S.C. §1262(a), the Secretary of the Treasury has promulgated regulations interpreting the anti-discrimination provisions of that Act, 31 C.F.R. §51.32 and 31 C.F.R. §§51.50 *et seq.*, 40 F.R. No. 208, Oct. 28, 1975, pp. 50029-32. Although the original anti-discrimination regulations contained in §51.32 were applicable to this case in a general way, the specific applicability of the recent amendments is unmistakable. Section 51.54(c) (2) provides in pertinent part:

> "It shall be an unlawful employment practice for [a recipient government] employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based upon sex. It shall be an unlawful employment practice for an employer to provide for both unequal benefits and unequal contributions in the areas of insurance, pension or retirement plans, welfare or other fringe benefits programs. Further, it shall be an unlawful employment practice for an employer to provide for either unequal benefits or unequal contributions in such areas unless such unequal benefits or unequal contributions are directly related to actuarial differences."

Like the other states, Connecticut has received and continues to receive substantial federal assistance, both in revenue sharing funds and in federal grants-in-aid. Since the inception of revenue sharing in 1972, Connecticut has received, or will receive during the current fiscal year, an estimated $114,000,000 at the state governmental level alone. See Report, *Current Economic Developments and the Effects on Connecticut State Revenues,* Office of Fiscal Analysis, Joint Committee on Legislative Management, Connecticut General Assembly, prepared March 21, 1975, pp. 26, 27 (hereinafter cited as *Report*). During the same general period, it has received or will receive approximately $637,101,000 in federal grants-in-aid. *Report,* p. 31, and Connecticut's *State Budgets for Fiscal Years 1972-3, 1973-4* and *1974-5.* Moreover, these figures do not include federal funds which go directly to various state agencies. *Report,* p. 28. Under the Revenue Sharing Act, federal funds received at the state level are not required to be applied for any particular purpose, as they are at the local level, 31 U.S.C. §1222, and Connecticut merely adds its revenue sharing funds to its General Fund. See, *e.g. The State Budget for The 1974-75 Fiscal Year,* Office of Fiscal Analysis, Connecticut General Assembly, July 1974, p. 18. Thus, virtually every program or activity undertaken by the State of Connecticut is funded in whole or in part by federal revenue sharing funds, the receipt of which was clearly

conditioned upon nondiscrimination. Equally clearly the State violated that condition.

The nexus between the nondiscrimination provisions of the Revenue Sharing Act and of Title VI of the 1964 Civil Rights Act and the extension in 1972 of the coverage of Title VII of that very same Civil Rights Act to state employees evidences a Congressional purpose to secure to those employees the same rights and remedies enjoyed by employees in the private sector. The legislative history of the 1972 amendments also reflects that purpose. If indeed there is a sovereign immunity exception to the 1972 coverage, Congress will have created a right without a truly effective remedy. This Court has heretofore been "unwilling to conclude that Congress intended so pointless and frustrating a result". *Parden v. Terminal Railway*, 377 U.S. at 190. Taken together, Title VI and Title VII, as amended, and the Revenue Sharing Act, must be read as conditioning the receipt of federal funds upon a waiver of sovereign immunity to the full extent of the remedies authorized by Title VII. By its acceptance of federal funds upon the appurtenant condition of nondiscrimination, Connecticut has waived its immunity to that extent.

In conclusion, according to "implied waiver" principles of Commerce Clause cases, Congress had the power to subject states to federal court suits. In the sensitive area of federal-state relations, it is fitting the Congress – made up of representatives of the various states – should have superior authority in matters of great national concern affecting individual rights. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). As to basic civil rights protected by the Fourteenth Amendment, the case for final Congressional authority is even more compelling and the need to demonstrate actions indicative of state consent is less relevant, if appropriate at all. Furthermore, federal "interference" is minimized when the State has itself

adopted strong anti-discrimination measures similar to federal laws and accepts federal revenue-sharing funds. Then the objection comes down to merely the monetary aspect of the total available and interconnected remedies. Yet, even here, Congress in its wisdom and concern for balanced federalism has given federal courts latitude to fashion the "equitable relief...appropriate." 42 U.S.C. §2000e-5(g). Thus the court "may" and can take cognizance of the state fisc and shape its decree accordingly. Guidance would be furnished by *Albemarle Paper Company v. Moody, supra,* 422 U.S. at 421, i.e., a back pay award could be reduced where this would "not frustrate the central statutory purposes of eradicating discrimination". Or a large award could be paid in future installments. In this case, full monetary relief is justified, mainly due to Connecticut's inexplicable procrastination. *cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960).[3] The consideration, however, that the federal court could under the statute take some account of the State's fiscal interests – perhaps by emphasizing the deterrent over the "make whole" purpose – indicates that Congress has not abused its power. Congress was given this power under two parts of the Constitution, it has necessarily and reasonably exercised the power, and it and the federal courts must retain such power unimpaired in

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[3] It should be noted that the method of funding Connecticut's retirement system does not involve the immediate "disruption" of the state treasury and budget which would usually result from a sizeable "retroactive" award, and which concerned the Court in *Edelman*, 415 U.S. at 666 n.11. Any recalculated benefits due retired male employees would first be paid from the monies already held in trust in the Retirement Fund under Conn. Gen. Stat. §5-156 (A. 20). While the general state treasury would subsequently have to "make up" the depletion of the Fund, this obligation can be budgeted for future years. The fiscal impact on the state is much like – and probably much less than – the ancillary effects of state compliance with the "prospective" decree. Note, *Attorneys' Fees and the Eleventh Amendment*, 88 Harv. L. Rev. 1875, 1880-82 (1975).

order effectively to combat discrimination against individual state employees.

IV. STATES' ELEVENTH AMENDMENT IMMUNITY HAS BEEN LIMITED BY LATER ENACTMENT OF FOURTEENTH AMENDMENT TO THE EXTENT THAT SUCH LIMITATION IS APPROPRIATE OR NECESSARY TO EFFECTUATE PURPOSES OF THE FOURTEENTH AND INTENTION OF CONGRESS IN ENACTING ANTI-DISCRIMINATION LEGISLATION UNDER SECTION 5.

A. This Question was not decided in Edelman:

The heading somewhat restates the question two members of this Court stated was unresolved in *Edelman v. Jordan,* 415 U.S. at 694 n. 2; *cf. Curtis v. Loether,* 415 U.S. 189, 198 n. 15 (1974). In *Ex parte Young,* 209 U.S. at 150, this Court expressly left open the question of whether the Eleventh Amendment had been limited by the later enactment of the Fourteenth. In *Edelman,* unlike this case, the Court was confronted with a claim for monetary awards arising out of a violation by a state of federal regulations implementing the Aid to the Aged, Blind and Disabled programs. The Court was not faced with, and did not decide, the question of whether, in the context of an action to enforce fundamental rights arising out of the Fourteenth Amendment and Congressional legislation under Section 5 of that Amendment, there need be any finding that the state had waived its immunity. The Second Circuit erroneously concluded that *Edelman,* "expressly overruled...[three] cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state". (App. 47a) That conclusion implies that *Edelman* bars a monetary award in all events. To the contrary, however, this Court was careful not to overrule those three cases, but only stated that, "we *disapprove* the Eleventh Amendment holdings of those cases

to the extent that they are inconsistent with our holding today." 415 U.S. at 671 (emphasis added) This Court did no more than urge caution when relying on such cases in the Eleventh Amendment context. It could do no more in *Edelman* because the Fourteenth Amendment issue presented here was not at stake, and it was not decided. If the Court does not consider that the reasons previously advanced by petitioners are sufficient to uphold their back pay – and attorneys' fees – claims based on Title VII, the Court should then turn its attention directly to this significant question, and decide that rights of individuals to equal protection as enforced by act of Congress must take precedence over any irreconcilable aspects of state immunity under the Eleventh Amendment.

To the extent that any conflict exists between the policies of the Eleventh Amendment and Section 5 of the Fourteenth Amendment, it is the Fourteenth Amendment which must prevail. Here, as in the case of inconsistent statutes, the specific and more recent provisions of the Fourteenth Amendment must prevail over the earlier and more general provisions of the Eleventh. The Fourteenth Amendment

> "was adopted as an amendment to the Constitution and operates as an amendment of every part of the Constitution to which it is at any time found to be repugnant.... It is the last declared will of the law-maker, and has paramount force and effect." *The Virginia Coupon Cases,* 114 U.S. 269, 331 (1885).

That the Fourteenth Amendment must authorize the adoption of all the relief provisions in Title VII is apparent from the legislative history of the Amendment itself.

B. Sovereign immunity has no application to activities which the Reconstruction Amendments placed outside the sovereign power of the States:

Sovereign immunity, the doctrine that a state cannot be sued without consent, is but a procedural incident to sovereignty itself, the right and power of a state to conduct its affairs in whatever manner it sees fit and without outside limitations. Sovereign immunity serves to protect the state, particularly the executive branch, in the exercise of this power from control or regulation by the judiciary.

In the discussions of sovereign immunity at the end of the eighteenth century, particularly those leading to the inclusion of some of that immunity in the Eleventh Amendment, the question of whether and to what extent a state had sovereign immunity was understood to turn on whether and to what extent the state itself was sovereign. The most important judicial exposition of the case for sovereign immunity is Justice Iredell's historic dissent in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 429 (1793). Justice Iredell reasoned that the state had, subject to certain limitations, succeeded to the sovereignty of the King, and that the immunity from suit attendant to this sovereignty had not been waived or lifted by Article III of the Constitution:

> "No other parts of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before."

The other members of the Court, while concluding that

Georgia could not claim immunity, agreed that procedural immunity and substantive sovereignty were inseparable. Justice Blair concluded that the states had waived both sovereignty and immunity by ratifying Article III. 2 U.S. at 452. Justice Cushing believed that Article III had abridged the sovereignty of the states and with it their immunity. *Id.* at 468. Justice Wilson and Chief Justice Jay maintained the state had no immunity because the people, not the state, were the sovereign. *Id.* at 453-466, 469-479. Hamilton, in the oft quoted argument for immunity in *The Federalist,* was also of the view that immunity derived from, and could not be asserted in the absence of, state sovereignty:

> "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty, were discussed in considering the Article of taxation, and need not be repeated here." (Number 81)

The discussion of taxation, contained in *The Federalist* No. 31, dealt with the extent to which the states had surrendered their *power* to enact certain types of taxes. (The same connection between the state's power and procedural immunity is reflected in the opinion in *Employees,* 411 U.S. at 287, 317.)

Justice Iredell rejected the suggestion that the states had never been sovereign or that that sovereignty had been waived by ratifying Article III of the Constitution creating federal jurisdiction over actions between a state and a citizen of another state. See Jacobs, *Sovereign Immunity*

and the Eleventh Amendment, 64-74 (1972). But both Iredell and Hamilton conceded state sovereignty could be lost by a substantive constitutional limitation on the powers of the states and that, in such a case, immunity would fail as well.

At the time this was a theoretical concession of no practical consequence. The Constitution as it existed prior to the Civil War contained few significant limitations on the sovereignty of the states in dealing with individual citizens The concept of federalism prevailing at that time left largely in the hands of the states decisions as to what basic rights, if any, individuals should have against state action, and how, if at all, those rights should be enforced. The national government assumed no substantial role under the Constitution in regulating the internal affairs of the states; such matters were conceived to properly be consigned to the exclusive jurisdiction of the states, and any federal interference would have transgressed the rights and reserved powers of the states. Disputes between states and individuals raising federal questions could reach the federal courts only under Section 25 of the Judiciary Act of 1875 providing for review in the Supreme Court. The few such cases which did reach the Supreme Court involved, not violations of federally protected rights, but state actions interfering with the conduct of the national government. See, *e.g., Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824); *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821). So long as the states' sovereignty in dealing with individual citizens remained intact, the immunity incident to that sovereignty was entirely appropriate.

In the decade following the Civil War this situation was deliberately and drastically altered by adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, which expressly limited the power of the states in their relations with private citizens. Those enactments, together with the statutes enforcing them, created a panoply of federal rights designed to implement the new national commitment to

racial justice. Congress clearly conceived that it was altering the relationship between the states and the nation, and working a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum v. Foster,* 407 U.S. 225, 242 (1972); *Zwickler v. Koota,* 389 U.S. 241, 245-46 (1967). The effect of those Amendments was to overturn several of this Court's earlier decisions regarding the rights of individuals against the states and the ability of the national government to protect those rights. See *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833); *Dred Scott v. Sandford,* 60 U.S. 393 (1857).

The changes wrought by the Reconstruction Amendments were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states and were opposed on just this ground. Congressman Edgerton, speaking against the Thirteenth Amendment, argued:

> "Better, sir, for our country, better for man, that negro slavery exist a thousand years than that American white men lose their constitutional liberty in the extinction of the constitutional sovereignty of the Federal States of the Union." Cong. Globe, 39th Cong. 1st Sess. (1865) 2987. See also *Id.* at 1366 (Remarks of Senator Saulsbury), 2939 (Remarks of Congressman Pruyn), 2941 (Remarks of Congressman Wood), 2943 (Remarks of Congressman Highby), 2962 (Remarks of Congressman Holman), 2994 (Remarks of Senator Pendelton).

Congressman Rogers, opposing the 1866 Civil Rights Bill, the provisions of which were later codified in Section 1 of the Fourteenth Amendment, urged:

> "I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to

> come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us." Cong. Globe, 39th Cong. 1st Sess. 1122-23. See also *Id.* at 604 (Remarks of Senator Cowan), 1415 (Remarks of Senator Davis), 1174 (Remarks of Congressman Rogers), 1156 (Remarks of Congressman Thornton).

Congressman Shanklin protested that the Fourteenth Amendment struck down "the reserved rights of the states." Cong. Globe, 39th Cong. 1st Sess. 1865-66. See also *Id.* at 2530 (Remarks of Congressman Randall), 2538 (Remarks of Congressman Rogers), 3147 (Remarks of Congressman Harding). Such objections, however, were to no effect, for such a restriction on state power and sovereignty was precisely the goal of the proponents of these measures who believed that the rights of the states ought not include "the right to defeat the very object for which all government is made .... to inflict wrongs on free citizens by a denial of the full protection of the laws." Cong. Globe, 42d Cong. 1st Sess. 84-85 App. (Remarks of Congressman Bingham).[4]

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[4] "From the beginning, the program for the protection of men in their civil rights encountered the destruction of federalism argument. The Thirteenth Amendment, the first constitutional expression of that program, was proposed, encountered the federalism objection, and was adopted anyway. Next, the civil rights bill, designed to implement the Thirteenth Amendment, had heaped upon it the same charge. It was adopted notwithstanding. Then, at last, came the Fourteenth Amendment, created to accomplish what the Thirteenth Amendment had been designed to do but had failed to do because of the continuation of the federalism objection, intended to remove from the Civil Rights Act the constitutional doubts arising from the federalism objection to it. The Fourteenth Amendment was itself, in turn, subjected to the very same criticisms. Despite that criticism, it too was adopted." ten Broek, *Equal Under Law*, 219-220 (1965).

The Reconstruction Amendments created precisely the circumstance in which Iredell and Hamilton had agreed immunity had no place, by stripping the states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of the laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have no authority, the free exercise of which can be protected from litigation, and in such a case the purpose underlying sovereign immunity and the Eleventh Amendment cannot be served.

C. The purposes of sovereign immunity and the Eleventh Amendment are inconsistent with the purposes of the Reconstruction Amendments:

While sovereign immunity was properly conceived as no more than an incident to sovereignty itself, the grant of immunity, particularly within a federal system, reflected a number of policies other than the mere protection of sovereignty itself. The policies which immunity would advance are, however, the very policies expressly rejected by Congress when it approved the Thirteenth, Fourteenth and Fifteenth Amendments.

Non-reliance on state enforcement:

Advocates of sovereign immunity both before and after passage of the Eleventh Amendment urged that judicial jurisdiction over claims against a sovereign was unnecessary because the King, or the executive and legislative branches of a state government, could and would do justice in any case brought to their attention. In England, Iredell argued, while the resolution of such grievances was technically at the discretion of the crown, it was the King's practice, through the Chancellor, to do whatever justice required. "If any person has, in point of property, a just demand upon a King, he must petition him in his court of chancery, where

his chancellor will administer right, as a matter of grace, though not upon compulsion." *Chisholm v. Georgia,* 2 U.S. 419, 442 (1793). A citizen with a claim against a state, it was said, could rely on the legislature's good faith and sense of public duty. 2 U.S. at 445-6. Hamilton urged that contracts between a nation and an individual were binding, not in a court of law, but "on the conscience of the sovereign." *The Federalist,* No. 81. The argument was reiterated by Congressman Diven in 1862 urging retention of sovereign immunity by the federal government:

> "Now, sir, what is the theory with regard to the satisfaction of claims against Governments? Why it is this: that Governments are always disposed to deal justly with their subjects; that Governments are never required or compelled by legal process to render justice to their subjects; and that they are always ready to do right when the right is ascertained; and the only object of a Court of Claims should be to aid the Government in determining what is right, and then the Government will do right always. That is the theory of government. It was a maxim of the common law that "the King can do no wrong," and it is the theory that Governments can do no wrong, that exempts them from this trial in courts to compel them to do right to their own citizens. It is false in theory to suppose that when an individual has a just claim against the Government it is necessary for him to sue the Government in a court of law to recover it." Cong. Globe, 38th Cong. 1st Sess. 1672.

The Supreme Court, in *Hans v. Louisiana,* 134 U.S. 1 (1890), reasoned that a state could be relied on to respect "the highest demands of natural and political law to preserve justice," and that the security for state loans "is the plighted faith of the State." 134 U.S. at 16, 21.

When the Reconstruction Amendments and legislation were proposed, opponents objected that such measures were

unnecessary, and that reliance could be placed on the "honest purpose of the several States" to protect the rights of citizens. Cong. Globe, 39th Cong. 1st Sess. 1294 (Remarks of Congressman Wilson). The conclusion of the Congress and the nation, however, was to the contrary: in particular that the southern states could not be relied upon to respect and protect the rights of freedmen. Speaking in favor of the 1866 Civil Rights Act, whose principles were soon incorporated in Section 1 of the Fourteenth Amendment, Representative Wilson explained:

> "If the States would all observe the rights of our citizens, there would be no need for this bill ... If they would recognize that "general citizenship" ... which under this [privileges and immunities] clause entitles every citizen to security and protection of personal rights, ... we might safely withhold action. And if above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny." Cong. Globe, 39th Cong. 1st Sess. 1117-18.

Congressman Cook argued:

> "Suppose ... these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen ... It is idle to say these men will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them. ... Does any man in this House believe that these people can be safely left in these States

without the aid of Federal legislation or military power? Does anyone believe that their freedom can be preserved without this aid? If any man does so believe, he is strangely blind to the enactments passed by legislatures touching those freed men." *Id.* at 1124-25. See also *Id.* at 503 (Remarks of Senator Howard), 602 (Remarks of Senator Lane).

Six years of experience after the Civil War served only to confirm Congress' fears in this regard, and the 1871 Civil Rights Act, including the predecessor of Section 1983, was enacted "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape,* 365 U.S. 171, 179 (1961). Congressman Shellabarger, the sponsor of the Act, urged:

> "To say that Congress can do no such thing as to make any laws so enforcing these rights, nor open the United States courts to enforce any such laws but must leave all the protection and law-making to the very states which are denying the protection, is plainly and grossly absurd." Cong. Globe, 42d Cong. 1st Sess., 68 App.

The "plighted faith of the States" – which the Supreme Court has found an adequate alternative to judicial enforcement of the contract clause in *Hans* – was expressly rejected as a sufficient guarantee of the rights of freedmen and others under the Reconstruction Amendments. Cong. Globe, 42d Cong. 1st Sess. 85 (Remarks of Congressman Bingham).

The Congress which approved the Thirteenth, Fourteenth and Fifteenth Amendments, had only a few years earlier ended the sovereign immunity of the federal

government. In his first State of the Union message, President Lincoln had urged abolition of that immunity:

> "It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department." Schlesinger and Israel, *The State of the Union Messages of the Presidents,* vol. 2, 1060 (1966).

The debates on this proposal centered on whether or not the federal government was already providing a prompt and just resolution of claims against it, the procedure until that time being for Congress to enact a special appropriation in the amount it felt fair. Proponents of immunity urged such justice was already being done, but a majority of the Congress concluded otherwise. Congressman Pendleton responded to the remarks of Congressman Diven quoted above:

> "My colleague on the committee has told us today that, in theory, the Government is always willing to do justice to the citizen, that it is always willing to do that which equity and justice requires it to do. Now, sir, that is very good in theory, but it is very bad in practice, and when that gentleman has had experience in examining the claims brought against this Government year after year ... he will find that there are innumerable claims on the calendar which have been examined and re-examined session after session. .. If the Government of the United States owes a debt to a citizen of the United States, why should that citizen be forced to come to Congress year after year, and spend his time and his money in besieging individual

> members, in order to show to them the justice of his claim, depending, in the end, even in the justest case, not upon its merits, but upon their patience to hear him fully, and their impartiality to judge fairly." Cong. Globe, 38th Cong. 1st Sess. 1675.

Congressman Bingham, the author of the Fourteenth Amendment, urged that the abolition of immunity would end the injustice of denying relief to citizens with legitimate grievances, and the corruption of the Congress by lobbyists pressing dubious claims. *Id.* at 1674. The statute conferring binding jurisdiction on the Court of Claims was enacted in 1863, 12 Stat. 765, and the remedies available to citizens broadened further in 1866. 14 Stat. 9.

The existence of a sovereign immunity defense in an action under the Reconstruction Amendments is manifestly incompatible with the purpose and background of those constitutional provisions. It cannot plausibly be urged that Congress first established a panoply of federal rights and remedies on the ground that the states would not voluntarily protect those rights, and yet intended to permit the states to avoid judicial enforcement of those rights on the grounds that the states would voluntarily protect such rights and that judicial enforcement was thus unnecessary. The same state legislature which enacted a discriminatory measure could hardly be expected, in response to the claims of its victims, to repeal that measure and appropriate funds to compensate them for any injuries suffered. Whatever support sovereign immunity may have commanded in the 1790's, by the 1860's Congress shared Lincoln's view that the courts were the most fair and efficient forums for resolving claims against the government.

Necessity of federal enforcement:

Federal jurisdiction over litigation against the states was opposed in the eighteenth century because of problems of enforcement which might arise. One of the great failings of

the Articles of Confederation was that under it the national government could carry out its desires and policies only through the action and good will of the states. If a state was not amenable to this process, the two levels of government were necessarily arrayed directly against each other, at best resulting in a cumbersome process and at worst threatening more serious conflict. The federalists sought to give the national government power to carry out its policies directly, rather than relying on or resorting to action against the states. It was to avoid the need to coerce the states into compliance that the new constitution was designed. Under a continuation of a confederacy, Hamilton warned, resort to such a military coercion was inevitable:

> "If there should not be a large army constantly at the disposal of the National Government, it would either not be able to employ force at all, when this could be done, it would amount to a war between parts of the Confederacy, concerning the infractions of a league; in which the strongest combination would be most likely to prevail, whether it consisted of those who supported, or those who resisted, the general authority. It would rarely happen that the delinquency to be redressed would be confined to a single member; and if there were more than one, who had neglected their duty, similarity of the situation would induce them to unite for common defense." *The Federalist,* No. 16.

But, Hamilton pointed out,

> "If the execution of the laws of the National Government should not require the intervention of the State Legislatures; if they were to pass into immediate operation upon the citizens themselves, the particular Governments could not interrupt their progress without an open and violent exertion of an unconstitutional power." *Id.*

Such affirmative efforts to obstruct enforcement of national laws were thought highly unlikely.

It was this same consideration which, for the federalists, militated against federal jurisdiction over the states. Hamilton himself pressed this argument in the oft quoted passage in *The Federalist* on the meaning of Article III of the proposed constitution:

> "To what purpose would it be to authorize suits against the States for the debts they owe? How could recovery be enforced? It is evident, it could not be done, without waging war against the contracting State, and to ascribe to the Federal Courts, by mere implication, and in destructing of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *The Federalist*, No. 81.

The fear that such jurisdiction over the states might lead to the use of force was, at the time, not unwarranted. In the face of *Chisholm*, the Georgia House of Delegates passed a statute making any effort by a federal marshal to enforce a judgment for Chisholm a felony punishable by death without benefit of clergy. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 56-57 (1972). In another private action in 1809 seeking to collect funds held by the heirs of the state treasurer of Pennsylvania, decided *sub nom. United States v. Peters*, 9 U.S. (5 Cranch.) 115 (1809), the governor deployed the state militia around the home of the heirs to prevent execution of the judgment. The United States marshal enlisted a posse, and an armed clash was averted only when the state relented in the face of direct threats by President Madison. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 77-80 (1972).

It cannot plausibly be maintained that those who framed the Reconstruction Amendments and civil rights

legislation would have opposed suits against the states on the ground that force might be required to enforce the resulting court orders. Throughout the period when these measures were being enacted the armed forces of the federal government, with the enthusiastic support of Congress, were stationed throughout the former rebel states and were deeply involved in administering and policing those areas. See Morrison, *The Oxford History of the American People*, 717-725 (1965). After a four-year Civil War of unprecedented cost, the willingness of the national government to resort to force to preserve the fruits of its victory cannot be doubted.

During the debates on the 1866 Civil Rights Bill, Congressman Thayer openly expressed this willingness:

> "Why have laws if Government has not the physical force and strength to enforce them? Enforce them if you can through the forms of judicial procedure and by the ordinary means at the command of judicial tribunals as this bill provides: but if there are combinations against the peaceful enforcement of these laws, why should not the military power of the United States, in pursuance of the express power given in the Constitution, come to the rescue of the civil power in order to enforce a law solemnly promulgated by the people of the United States?" Cong. Globe, 39th Cong. 1st Sess. 1153.

Senator Pool expressed the same conviction six years later in support of the 1871 Civil Rights Act regarding the constitutional guarantee of equal rights:

> "If the states shall fail to secure and enforce this right of the colored man, and deny to him protection in the free exercise of it as a citizen of the State, then the United States, by virtue of his national citizenship, must and will, by appropriate legislation, by all the power of its courts, by its land and naval forces,

> extend over him within the States the shield of the national authority. ... I yet hope it is possible to escape more violent means by a prompt resort to the ordinary federal tribunals of justice. Unless that resort be promptly and efficiently taken, there is no hope of escaping for another year the application of the most stringent and ruinous military measures." Cong. Globe, 42d Cong. 1st Sess. 609.

Both civil rights acts contained express provisions for resort to military rule if civil measures proved inadequate to protect the rights of the freedmen. See 14 Stat. 27, 17 Stat. 13.

To suggest that suits against the states under the Reconstruction Amendments should be forbidden to avoid problems of enforcement would be to ignore the fact that the Congresses which framed those provisions were determined to use whatever measures were necessary to enforce the rights described therein. Nor are suits against state officers any less likely to incur virulent state opposition; the history of the last century, particularly since *Brown v. Board of Education,* 347 U.S. 483 (1954), is studded with instances where extraordinary federal action was necessary to effectuate the decree of a federal court against such officers.

Remedial purpose of the Reconstruction Amendments:

The defense of sovereign immunity, if allowed in all cases, would operate in some circumstances to deny citizens an effective judicial remedy to enforce their rights. Undoubtedly there are circumstances under which such a normally incongruous situation might be appropriate. Where control of state conduct is not a primary concern of the provisions establishing those rights, it may be that subjecting the states to judicial control is too drastic a method of achieving a largely incidental purpose. Where there is little reason to doubt the states will voluntarily comply with the

federal requirements, Congress might conclude that harmonious federalism would best be served by trusting the states to act without threat of litigation. And where a fully effective means of enforcement less drastic than federal litigation is available, the necessity for such litigation might be doubted. See generally *Employees,* 411 U.S. 279 (1973).

None of these factors, however, are present here. Control of the states was not a merely incidental effect of the Reconstruction Amendments, it was the primary concern and goal. See *The Civil Rights Cases,* 109 U.S. 7 (1883). Enforcement of the Reconstruction Amendments has traditionally been left primarily in the hands of private litigants. See 42 U.S.C. §§1981-1983. Those amendments and the contemporaneous legislation were founded on the conviction that the states could not be relied on to voluntarily comply with the law. The men who framed those Amendments were primarily concerned, not with preserving the delicate balance of harmonious federalism, but with assuring compliance by the recalcitrant states through whatever means necessary.

The Supreme Court has long recognized the particular undesirability of leaving those asserting constitutional rights without an effective remedy. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, wherever he receives an injury." *Marbury v. Madison,* 1 U.S. (Cranch) 137, 163 (1803), quoted in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 338, 397 (1971).

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on

> Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, ex post facto law, of impairing the obligation of contracts or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war, – all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding those constitutional limitations. Much less can the 11th Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the 14th Amendment have been disregarded by state enactments." *Prout v. Starr,* 188 U.S. 537, 543 (1903).

See also *General Oil Co. v. Crain,* 209 U.S. 211, 226-27 (1908); *Osborn v. The Bank of the United States,* 22 U.S. (9 Wheat.) 738, 849 (1824); Jacobs, *The Eleventh Amendment and Sovereign Immunity* 144 (1972).

That any rights arising under the Reconstruction Amendments should be without a remedy is particularly inappropriate since these Amendments, especially the Fourteenth, were primarily remedial. The abolitionists who finally won control of the Congress and many states in the 1860's and 1870's had long maintained that the rights described in the Thirteenth, Fourteenth and Fifteenth Amendments already existed, though not recognized, by virtue of the privileges and immunities clause and the Bill of Rights. See generally ten Broek, *Equal Under Law* (1965); Graham, *The Early Anti-slavery Backgrounds of the Fourteenth Amendment,* 1950 Wis. L. Rev. 479; Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,*

47 Yale L.J. 371 (1938). Congressman Wilson, speaking in favor of the 1866 Civil Rights Bill explained:

> "Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those that already belong to every citizen." Cong. Globe, 39th Cong. 1st Sess. 1117.

Section 1 of the Fourteenth Amendment, according to Congressman Bingham who drafted it, was not to create new substantive rights at the expense of the states:

> "[T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under forms of law or otherwise, to deny to any freed man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy." *Id.* at 2452.

The problem to which these Amendments and related legislation were addressed was the unenforceability of these rights. As Congressman Bingham detailed, in support of the 1871 Civil Rights Act,

> "The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They

> restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy." Cong. Globe, 42d Cong. 1st Sess. 85 App.

It was to create such a federal remedy for the aggrieved citizen — not for the Attorney General — that the Reconstruction Amendments were enacted. See *Monroe v. Pape,* 365 U.S. 167 (1961).

It would be incongruous if the states were able to deny such a remedy by closing "portions" of such litigation to the federal courts. One of the discriminatory practices of particular concern to Congress after the Civil War was state legislation forbidding Blacks to institute litigation or testify in state courts. *Monroe v. Pape,* 365 U.S. at 176-178 (1961); ten Broek, *Equal Under Law,* 187n, 191n, 192 (1965). This denial of justice was particularly opprobrious when the basic rights were involved. As Bingham urged even before the Civil War regarding the privileges and immunities clause,

> "This guarantee of the Constitution of the United States is useless and a mockery, if it does not limit State sovereignty and restrain each and every state from closing its territory and its courts of justice against citizens of the United States." ten Broek, *Equal Under Law,* 333-34 (1965).

Proponents of the Amendments rejected the suggestion that, because of considerations of federalism, federal "courts must be closed to the appeal of our citizens." Cong. Globe 39th Cong. 1st Sess. 1924 (Remarks of Congressman Shellabarger). That the states should be able to close the federal courts to civil rights litigation is particularly inappropriate since, in most cases, the states have long ago opened their courts to litigation against themselves arising out of loans or other commercial activities.

The manifest desire of Congress in framing the Reconstruction Amendments was to exercise all its power to create an effective remedy and to withdraw from the states any power to defeat or prevent enforcement of certain basic rights. Congressman Bingham denied that the states had the right to deny constitutional rights "under any pretext whatever." Cong. Globe, 39th Cong. 1st Sess. 1088. Congressman Lawrence declared:

> "There are certain absolute rights which pertain to every citizen, which are inherent, and of which a state cannot constitutionally deprive him. But not only are those rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so." *Id.* at 1833.

The plethora of unprecedented legislation in the decade after the Civil War is ample evidence of the willingness of the Congress, in the words of one Senate critic, "to overturn the whole Constitution in order to get at a remedy for these people." *Id.* at 499 (Remarks of Senator Cowan). By the time the Civil Rights Act of 1871 was debated, the dispute within Congress was no longer over what type of judicial remedy to afford. Liberals and conservatives agreed that vindication of constitutional rights should be sought first from the federal judiciary, where the complainant was to be afforded "all the power of its courts." See Cong. Globe, 42d Cong. 1st Sess. 578 (Remarks of Senator Trumbull), 609 (Remarks of Senator Pool). The debate centered over what further remedies, such as martial law, Congress should provide if all the powers which could be conferred upon the courts were exhausted and found wanting. Congress can hardly have intended to deny the federal courts the authority, when needed, to entertain suits against the states, for such a limitation would have increased the need for resort to drastic extrajudicial measures which northerners and southerners alike wished to avoid.

Under these circumstances the existence of a sovereign

immunity defense in litigation under the Reconstruction Amendments is entirely incompatible with the rights protected by those Amendments. The policies and assumptions of fact which underlie sovereign immunity are precisely the policies and assumptions rejected by Congress in the decade following the Civil War when the Fourteenth Amendment was adopted. A decade ago this Court summarily and unanimously rejected similar contentions – and upheld sweeping relief and "impact" – in *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 228 (1964). Sovereign immunity is a discredited doctrine, yet it has been woven into the Eleventh Amendment–which was also passed in response to state antagonism to suits by individuals to force payment of war-related and commercial debts. To the degree necessary, the Eleventh must be limited by the ultimate supremacy of federal law – and by the rule of law in a modern society committed to enforce rights to Equal Protection under the Fourteenth Amendment.

Conclusion

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals should be reversed and the case remanded to the District Court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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